KA Sanduran Nehru a/l Ratnam v I-Berhad

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A02–1076 OF 2003
DENIS ONG, MOHD GHAZALI AND JAMES FOONG JJCA
1 DECEMBER 2006

Civil Procedure — Judicial review — High Court — Award of Industrial Court — High Court granted order for readjudication before another chairman of the Industrial Court — Whether High Court only confined to relief claimed and could not order for readjudication — Rules of the High Court 1980 O 53 r 2(3)

Labour Law — Employment — Dismissal — Taking out bottle of 'thinner' from employer's premises without prior approval — Employer only suffered minimal loss — Whether punishment of dismissal was excessive

Labour Law — Industrial Court — Finding of fact — Findings unsupported by evidence — Chairman introduced technicalities of court of law to Industrial Court instead of going into substantial merits of case — Whether award ought to be quashed

The appellant was employed by the respondent since February 1973. At the time of his dismissal on 7 October 1999, the appellant was holding the position of an Assistant Line Captain in the Paint Shop section of the respondent. It was the respondent's company work rule that workers are not allowed to take away any property out of the respondent's premises without proper authorization from the management. On 22 September 1999 at about 5.05pm, the appellant, at the end of his shift, was found by the respondent's security guard at the exit point to the respondent's premises carrying out without prior approval a 1.5 litre bottle containing 'thinner'. A domestic inquiry was held and in the course of the domestic inquiry, the appellant admitted taking out the bottle of thinner for his own use from the respondent's premises. The panel conducting the domestic inquiry found the appellant guilty of the charge against him. The respondent consequently dismissed the appellant. The appellant considered that he was dismissed without just cause or excuse and hence made representations in writing to the Director General for Industrial Relations pursuant to the provisions of s 20 of the Industrial Relations Act 1967 ('the Act') to be reinstated to his former employment. The representations were subsequently referred to the Industrial Court for an award. On 30 August 2001, the Industrial Court concluded that the appellant's dismissal was 'not only without just cause or excuse, it was also unreasonable, not in good conscience and excessively harsh'. The Industrial Court consequently ordered the respondent to make monetary compensation to the appellant consisting of back wages and compensation in lieu of reinstatement. On 17 November 2003, the learned judge of the High Court allowed the respondent's application with costs and quashed the award and ordered that the

matter be remitted to the Industrial Court 'to be dealt with accordingly before a different panel'. The appellant henceforth appealed to this court. At the appeal before this court, learned counsel for the appellant submitted that the learned judge completely overlooked the alternative finding of the Industrial Court that the punishment of dismissal was excessive. He argued that the learned judge had not given any reasons why he found that differentiating the types of thinner was irrelevant and that an error of law was committed given that the specific reason the respondent had given for dismissing the appellant was that he had taken out thinner that could be used for paint mixing.

Held, dismissing the appeal with costs:

(1) The learned judge adopted the correct approach when he said that what matters was not type of thinner that was taken out, but the taking out of 1.5 litre of thinner without authorization. The learned judge was right when he found that the Industrial Court had committed an error in law in finding that the thinner that was taken by the appellant was not the thinner that was used for the mixing of paint and that it was 'unwanted thinner'. The evidence clearly showed that the thinner used for mixing paint in the store was the same thinner that was given upon request for cleaning the spray gun and the worker's hands. In relation to this, the learned chairman of the Industrial Court had also taken into account an irrelevant consideration in arriving at the decision that she made, namely, that the respondent only suffered a loss which was minimal as it involved only 1.5 litre of thinner. The value of the thinner which was taken out of the factory by the appellant was immaterial. What was material was that the thinner was the respondent's property and the appellant was not authorized to take it out of the respondent's premises (see para 29).

(2) The main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal and that the High Court will not interfere with finding of facts by the Industrial Court unless the same completely unsupported by evidence; *Menara Pan Global Sdn Bhd v Arokianathan Sivapiragasam* [2006] MLJU 131 followed. In the instant appeal, the finding of facts made by the learned chairman could not be supported. Further, she had introduced technicalities of the court of law to the Industrial Court instead of going into the substantial merits of the case. In determining the misconduct of the appellant, the Industrial Court proceeded as if it was exercising the function of a criminal court. The High Court judge had rightly appreciated that judicial review is not an appeal from the decision but a review of the manner in which the decision is made (see para 31).

(3) The learned judge was perfectly correct in ordering that the matter be remitted for readjudication before another chairman of the Industrial Court. The High Court pursuant to O 53 r 2(3) of the Rules of the High Court 1980 may make any order upon hearing an application for judicial review and it shall not be confined to the relief claimed. The learned judge had deemed it appropriate to

remit the matter for readjudication. That decision was clearly within his powers and he had exercised that discretion judiciously under the circumstances of this instant appeal (see para 33).

[Bahasa Malaysia summary

Perayu diambil bekerja oleh responden semenjak Februari 1973. Semasa pemecatannya pada 7 Oktober 1999, perayu memegang jawatan sebagai 'Assistant Line Captain' di bahagian 'Paint Shop' responden. Adalah peraturan bekerja syarikat responden bahawa pekerja-pekerja adalah tidak dibenarkan untuk membawa keluar mana-mana harta daripada premis responden tanpa kebenaran yang sah daripada pihak pengurusan. Pada 22 September 1999 pada lebih kurang 5.05 petang, perayu, semasa di akhir gilirannya bekerja, telah didapati oleh pengawal keselamatan responden di tempat keluar premis responden, membawa keluar tanpa kelulusan terlebih dahulu satu botol 1.5 liter yang mengandungi 'pencair'. Siasatan dalaman telah diadakan dan berdasarkan kepada siasatan dalaman tersebut perayu mengakui mengambil keluar botol pencair untuk kegunaannya sendiri daripada premis responden. Ahli panel yang mengendalikan siasatan dalaman mendapati perayu bersalah atas dakwaan ke atasnya. Responden dengan itu memecat perayu. Perayu merasakan bahawa beliau telah dipecat tanpa sebab dan alasan yang adil oleh itu telah membuat representasi bertulis kepada Ketua Pengarah Perhubungan Industri menurut peruntukan s 20 Akta Perhubungan Perusahaan 1967 ('Akta') untuk dikembalikan kepada jawaatn asalnya. Representasi tersebut kemudiannya dirujuk kepada Mahkamah Perusahaan untuk satu award. Pada 30 Ogos 2001, Mahkamah Perusahaan mendapati bahawa pemecatan perayu adalah 'bukan hanya tanpa sebab atau alasan yang adil, ianya juga adalah tidak munasabah, tidak berperasaan dan terlalu keras'. Mahkamah Perusahaan seterusnya memerintahkan responden membayar pampasan kewangan kepada perayu yang termasuk gaji terdahulu dan pampasan sebagai ganti pengembalian kedudukan jawatan. Pada 17 November 2003, hakim Mahkamah Tinggi yang bijaksana membenarkan permohonan responden dengan kos dan membatalkan award dan memerintahkan bahawa perkara tersebut diremitkan ke Mahkamah Perusahaan 'untuk ditangani dengan sewajarnya di hadapan panel yang berbeza'. Perayu kemudiannya merayu ke mahkamah ini. Ketika rayuan di mahkamah ini, peguamcara perayu yang bijaksana menghujahkan bahawa hakim yang bijaksana benar-benar terlepas pandang penemuan alternatif Mahkamah Perusahaan bahawa hukuman pemecatan adalah keterlaluan. Beliau menegaskan bahawa hakim yang bijaksana tidak memberikan sebab-sebab kenapa beliau mendapati bahawa pembezaan jenis pencair adalah tidak relevan dan oleh itu kesilapan perundangan telah dilakukan di mana aladan spesifik yang diberikan oleh responden untuk memecat perayu adalah bahawa beliau telah membawa keluar pencair yang boleh digunakan untuk campuran cat.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim yang bijaksana menggunakan pendekatan yang betul apabila beliau menyatakan bahawa perkara tersebut adalah bukannya jenis pencair yang dibawa keluar, tetapi membawa keluar 1.5 liter pencair tanpa kebenaran.

Hakim yang bijaksana adalah benar apabila beliau mendapati bahawa Mahkamah Perusahaan telah melakukan kesilapan dalam undang-undang dalam mendapati bahawa pencair yang diambil oleh perayu bukanlah pencair yang digunakan untuk mencampurkan cat dan ianya adalah 'pencair yang tidak diperlukan'. Bukti jelas menunjukkan bahawa pencair yang digunakan untuk mencampurkan cat di dalam store adalah pencair yang sama yang diberikan semasa permintaan untuk membersihkan alat penyembur dan tangan pekerja. Berkaitan dengan itu, pengerusi Mahkamah Perusahaan yang bijaksana telah juga mengambil kira pertimbangan yang tidak relevan dalam mencapai keputusan yang dibuat olehnya, iaitu responden hanya menanggung kerugian yang mana adalah minimum iaitu ianya melibatkan hanya 1.5 liter pencair. Nilai pencair yang dibawa keluar daripada kilang oleh perayu adalah tidak penting. Apa yang penting adalah pencair tersebut adalah harta milik responden dan perayu adalah tidak dibenarkan untuk mengambilnya keluar daripada premis responden (lihat perenggan 29).

(2) Satu-satunya fungsi dan fungsi utama Mahkamah Perusahaan dalam mengendalikan dengan merujuk di bawah s 20 Akta tersebut adalah untuk menentukan sama ada salah laku atau perkara yang tidak kena yang diadukan oleh pihak pengurusan terhadap alasan pemecatan yang mana sebenarnya dilakukan oleh pekerja dan jika benar, sama ada alasan tersebut menjadikan sebab dan alasan yang adil untuk pemecatan dan Mahkamah Tinggi tidak akan campur tangan dengan penemuan fakta oleh Mahkamah Perusahaan kecuali perkara yang sama keseluruhannya tidak disokong dengan bukti; *Menara Pan Global Sdn Bhd v Arokianathan Sivapiragasam* [2006] MLJU 131 diikut. Dalam rayuan ini, penemuan fakta yang dibuat oleh pengerusi yang bijaksana tidak dapat disokong. Selanjutnya, beliau telah memperkenalkan alasan-alasan teknik mahkamah perundangan ke Mahkamah Perusahaan daripada menjurus kepada merit kes yang penting. Dalam menentukan salah laku perayu Mahkamah Perusahaan meneruskan sebagaimana jika ianya melaksanakan fungsi mahkamah jenayah. Hakim Mahkamah Tinggi adalah benar dalam menilai semakan kehakiman adalah bukannya rayuan daripada keputusan tetapi satu semakan sebagaimana keputusan dibuat (lihat perenggan 31).

(3) Hakim yang bijaksana adalah sememangnya tepat dalam memerintahkan perkara tersebut dikembalikan untuk diputuskan semula di hadapan pengerusi Mahkamah Perusahaan yang lain. Mahkamah Tinggi menurut A 53 k 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 boleh membuat apa-apa perintah selepas mendengar permohonan untuk semakan kehakiman dan ianya tidak terbatas untuk merelifkan tuntutan (lihat perenggan 33).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.

For cases on finding of fact, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1446–1448.

For cases on judicial review, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 486–489.

Cases referred to

Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor [1994] 2 MLJ 167 (refd)
Menara Pan Global Sdn Bhd v Arokianathan Sivapiragasam [2006] MLJU 131 (folld)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair [2002] 3 MLJ 129 (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20
Rules of the High Court 1980 O 53 r 2(3)

Fathima Idris (Idris & Associates) for the appellant.
TM Varughese (TM Varughese & Co) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The appellant, who was an employee of the respondent, a locally incorporated company, considered that he was dismissed without just cause or excuse and hence made representations in writing to the Director General for Industrial Relations pursuant to the provisions of s 20 of the Industrial Relations Act 1967 ('Act') to be reinstated to his former employment. The representations were subsequently referred to the Industrial Court for an award.

[2] On 30 August 2001, the Industrial Court concluded that the appellant's dismissal was 'not only without just cause or excuse, it is also unreasonable, not in good conscience and excessively harsh'. The Industrial Court also concluded that since the appellant was now gainfully employed 'it would be better that no order of reinstatement is made'. The Industrial Court consequently ordered the respondent to make monetary compensation to the appellant consisting of back wages and compensation in lieu of reinstatement.

[3] The respondent, upon leave being granted by the High Court, applied for, inter alia, the following reliefs:

(i) an order of certiorari to quash the award of the Industrial Court dated 30 August 2001; and

(ii) that all necessary and appropriate directions be made.

[4] On 17 November 2003, the learned judge of the High Court allowed the respondent's application with costs and quashed the award and ordered that the matter be remitted to the Industrial Court 'to be dealt with accordingly before a different panel'. The appellant henceforth appealed to this court.

[5] The facts showed that the respondent manufactured household products such as refrigerators, air conditioners, electric fans and rice cookers. In its Paint Shop

section, the employees are involved, among other things, in painting the components of the household products manufactured. For purposes of mixing the paint for painting and also for cleaning spraying equipment, the respondent uses a thinner which is kept in its store. It is the respondent's company work rule that workers are not allowed to take away any property out of the respondent's premises without proper authorization from the management.

[6] The appellant was employed by the respondent since February 1973. At the time of his dismissal on 7 October 1999, the appellant was holding the position of an Assistant Line Captain in the Paint Shop section. His last drawn salary was RM1,439. On 22 September 1999 at about 5.05pm, the appellant, at the end of his shift, was found at the exit point to the respondent's premises carrying out a 1.5 litre bottle containing some liquid by the respondent's security guard. When questioned as to the contents of the said bottle, the appellant replied that it was battery water. Being dissatisfied with the appellant's answer, the said security guard sought the co-operation of another factory worker as to the contents of the bottle in the appellant's possession. The said factory worker confirmed that the bottle contained 'thinner'. The security guard then brought the appellant to see the respondent's Human Resources Manager along with the other factory worker.

[7] By letter dated 23 September 1999, the respondent wrote to the appellant as follows:

> Dear Nehru,
>
> It has been reported that on 22 September 1999 between the hours of 17.05 to 17.30 you were alleged to have committed the following.
>
> That you had deliberately and knowingly had taken out 1.5 litre of thinner which can be used for paint mixing without authorisation or prior approval, instead for your personal gains and not for any justifiable reason whereby you were caught by the security guard at the exit point.
>
> In view of the seriousness of the misconduct, the Company has decided to suspend you pending inquiry on half pay for the duration of 14 days effective 24 September 1999. If the result of the inquiry does not establish a case against you, the Company shall forthwith restore you to the full amount of wages so withheld in accordance with E/A 1955.
>
> During this period of suspension pending inquiry, you will be required to make yourself available to assist the Company in its investigations.
>
> If you wish to be assisted by the Union representative, kindly inform the undersigned three days prior to the date of inquiry so that necessary arrangements can be made to allow them to attend the inquiry.
>
> The Company proposes to conduct the inquiry into the above mentioned allegation on 6 October 1999 at 9am at I-Berhad's downstair conference room.
>
> Please note that if you fail to attend the above mentioned inquiry, the inquiry will proceed ex parte.

Yours faithfully,

(Signed)

MP Mano — Dy General Manager

Human Resources Department.

[8] The appellant acknowledged receipt of the above letter on the same day. The domestic inquiry was held on 6 October 1999 as scheduled. The charge against the appellant read:

That you had deliberately and knowingly taken out 1.5 litre of thinner which can be used for paint mixing without authorization or prior approval, for your personal gains and not for any justifiable reason whereby you were caught by the security guard at the exit point.

[9] In the course of the domestic inquiry, the appellant admitted that he had written a letter of declaration ('surat pengakuan') wherein he admitted taking out the bottle of thinner for his own use from the respondent's premises. That letter of declaration, dated 22 September 1999, reads:

Adalah saya yang bernama seperti di atas dengan ini kata dengan jujur telah melakukan suatu kesilapan dengan membawa keluar 1.5 liter thinner bagi kegunaan sendiri.

Adalah dengan ini juga saya mengaku telah melakukan kesilapan yang tidak sepatutnya saya lakukan mengikut undang-undang syarikat.

Saya berharap pihak syarikat dapat memberi pertimbangan di atas perkara ini kerana ini adalah merupakan kali pertama kesilapan yang telah saya lakukan.

[10] At the end of the day, the panel conducting the domestic inquiry found the appellant guilty of the charge against him and recommended that he be dismissed and that he be given a chance to resign. The respondent consequently decided to dismiss the appellant with effect from 7 October 1999.

[11] In the Industrial Court, the respondent's Chief Executive Officer in his evidence stated as follows:

I took over the Company in the middle of 1999 following a change in the shareholding of the Company. At the time when I took over the Company was suffering large losses, eg in 1998 the Company made a loss of 5 million, in 1999 when I took over the Company was also in the loss making position. So for 1999 the Company lost 5 million. One of the things we looked at was why was the Company losing money and the conclusion we came was firstly the material lost was high, secondly the labour productivity was low. So we took steps to improve productivity and to control the material usage. With regards to the materials, when I took over we conducted a stock count. When we compared the physical quantities with the book, there was quite a lot of discrepancies between 3% to 5%. We have RM15 millions to RM20 millions of material any one time in the Company. This discrepancy was

a big concern. We have the meeting with the staff and the management team to understand the discrepancy and we conclude there were two possible reasons; (1) could be fraudulent practices ie, less being delivered to when we made the purchase; (2) pilferage of things from the factory; (3) wastage could be higher than what we planned. So as a control what we instituted was that at the end of every month, the whole factory stopped production and we did stock count. This was effective from the month of June/July 1999.

In August 1999 we caught one lady operator taking some parts of the fridge without permission. This was a big incident in the Company. The Union got involved in this matter and the Union undertaking that they would inform all the people in the factory that taking the Company's goods is a serious offence.

When this case came before me, I think there were three considerations taken in for arriving at my decision. First was that the claimant was a Union committee member and the Union committee was awared of the seriousness of this offence and the claimant is a committee member and the fact that it happened one month after the incident of the lady, give me the feeling that no one is paying serious attention to the rules of the Company. The second thing is that the claimant was 26 years with the Company because the Company motivate the staff to stay with them. For example there is no salary ceiling for the staff hence get an increment yearly. Because the Company motivate them to stay, the Company expects both discipline and co-operation from the staff. The third thing is that although the value of the thinner is small ie, less that RM10, I was relating back to the case of the lady incident, if everyone is doing it, accumulatively the impact on the Company is great as can be seen from our stock discrepancies.

Thinner is one of the component we used in the production process, it is used for mixing the paint.

[12] One Abdul Majid Hassan, who was holding the post of 'Production Executive' and who looked after the Paint Shop section stated that the thinner is used for mixing the paint and such work was carried out in the store. The thinner is also used for cleaning the spray gun and the worker's hands. For carrying out such cleaning work, the thinner has to be requested from the store. The thinner, normally amounting to two litres or more, will then be poured into a container to be used for such cleaning work. He also stated that the appellant being the worker in charge could request the thinner from the store but it cannot be taken out from the respondent's premises. He confirmed that on 22 September 1999, the appellant never requested his permission to take the thinner out of the respondent's premises. He then explained that overcoats are provided to workers carrying out spraying work and that no worker had ever taken out the thinner from the respondent's premises to clean his shirt.

[13] One Kok Chee Peng, who was working as a supervisor at the Paint Shop section and whose duty was to mix the paint and the thinner testified that the thinner is also used for washing the spray guns and that when one is washing the spray gun, the thinner will get into contact with the hands and hence the hands will simultaneously be cleaned in the process. He also stated that when a worker carry out spraying work, some paint will get on to his body which is not covered by the

overcoat. A piece of cloth will then be dipped into the thinner and used to wipe the hands. He disagreed with the suggestion by the appellant's counsel that workers do take the thinner home.

[14] In his evidence, the appellant stated that he took the thinner that day because he wanted to clean his shirt which was stained with paint. He admitted that he did not get permission to take the thinner out from the respondent's premises.

[15] In her award, the learned Chairman of the Industrial Court said as follows:

> From the evidence by both parties, it is not in dispute that the Claimant was carrying 1.5 litre of thinner in a bottle when he was questioned by the security guard at the exit point of the Company. It is also not in dispute that this taking out of the thinner is without the authorization or prior approval of the relevant officers of the Company.

[16] In relation to the charge against the appellant at the domestic inquiry, she said:

> ... the other elements of the charge which have to be considered are whether the thinner was to be used for mixing paint and the claimant has taken it for personal gains and not for any justifiable reason.

[17] The learned Chairman then went on to find that the evidence adduced by the respondent failed to show that the thinner taken out by appellant can be used for mixing paint. She said the evidence showed that the mixing of paint and the thinner was carried out in the store itself whereas the thinner used for cleaning purposes would be given to supervisors who requested for it and that thinner would be placed in a container. She then found as follows:

> Hence from the evidence given by COW–5 it is obvious that 1.5 litre of thinner which the claimant has with him on that day cannot be the thinner which can used for mixing paint. This is because the thinner to be used for mixing paint is kept in the store and not being taken out since the mixing of the paint and the thinner is done in the store itself.

[18] In coming to the above conclusion, viz, that there were two different types of thinner, the learned Chairman referred to the evidence of the appellant; he had testified that the thinner which he took was the 'unwanted thinner' which was left at the area where he was doing the dipping process on that day and that the thinner which was left there were used by the workers for cleaning hands, shoes, trousers and shirts. In relation to this, the learned Chairman said:

> As for the element that the claimant has taken it for personal gains and not for any justifiable reason, the Company has not adduced any evidence at all. The claimant however throughout his testimony and also in the statement of case has stated that the thinner was taken by him for the purpose of cleaning his clothes. This shirt of his was dirtied with black paint. According to the claimant his clothes was dirtied with paint on that day because when he was doing the dipping of the condensers the paint dripped on his clothes and this clothes was the company's uniform.
>
> Evidence was adduced through COW–4 and COW–5 that there were workers who used thinner to clean their clothings but they were do so at their working place. Thought that

may be so, but in the claimant's case evidence has been adduced that his clothes was soiled/dirty. Therefore what was stated by the claimant that his clothes was in a dirty condition which needed to be cleaned and washed at home is reasonable in this circumstance.

The learned Chairman then went on to say as follows:

As mentioned earlier, the Company has failed to show that the thinner was in the possession of the claimant at that time was the thinner which can be used for mixing with the paint. On this point there was the evidence of the claimant that he took the thinner which was given by the store to the workers for them to use for the cleaning of the spray guns, hands and clothings. Further the Company has not adduced any evidence that this act of the claimant enables him to obtain personal gains and not for any justifiable reason. Hence, even though the claimant has admitted taking out the thinner without authorisation or prior approval, the failure of the Company to establish these two elements put the Company in an unfavourable light in discharging the burden of proof placed on them.

A misconduct which is criminal in nature and in this case it is that of theft/pilferage, it is essential to show the dishonest intention which is either to cause wrongful gain or wrongful loss. In this case it is undeniable that the Company suffered a loss but a minimal one since it involved 1.5 litre of thinner. However the claimant in his evidence has consistently stated that the thinner which he had taken was for the purpose of cleaning his shirt which has been dirtied by the paint which splashed on it when he was doing the dipping process. This shirt of his was the Company uniform which was supplied to him to be worn when working. Thus the cleaning of this shirt of cannot amount to a personal gain. Also since the thinner taken was to be used to clean his shirt, the claimant thus has a justifiable reason for the which he has done.

Such being the case, this court is of the view that the Company before coming to a finding of guilt for any act involving criminal liability the Company have to prove all the elements/ingredients stated in the charge levelled against the employee.

In the event this court is wrong in finding that the Company has failed to prove the offence alleged against the claimant, this Court has proceeded to consider whether the nature and extent of the misconduct committed by the claimant constitutes just cause or excuse for the dismissal. The nature and extend of the misconduct has to be looked into for the purpose for determining whether the punishment of dismissal is warranted. This is because dismissal is very serious form of punishment as it affects the livelihood of the employee and those who depend on his solely.

[19] The learned Chairman then found that the appellant acted bona fide (in taking the thinner out from the respondent's premises) and that the respondent has failed to give consideration to the appellant's unblemished record of service. She concluded as follows:

This Court finds that after having regard to the Company's interests as well as the nature and extent of the alleged misconduct of the claimant, the Company's act in dismissing the claimant is not only without just cause or excuse, it is also unreasonable, not in good conscience and excessively harsh.

[20] She then went on to award a sum of RM17,268 for back wages after making an 'adjustment of 40% less' and a sum of RM37,414 as compensation in lieu of reinstatement.

[21] The respondent applied to the High Court for judicial review. The learned judge of the High Court held that the Industrial Court had adopted and applied a wrong standard of proof in holding that the respondent has failed to prove dishonest intention and further stating that the respondent has not been able to discharge their evidential burden in failing to prove every element of the charge. He went on to say that the function of the Industrial Court is best described by the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 where in delivering the judgment of the court Mohd Azmi FCJ said (at p 762):

> On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise lawfully provided by the terms of the reference), is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.

The learned judge also referred to several other authorities and then said:

> On the host of authorities aforementioned, it is clear that the Industrial Court is not a court of law where technicalities of the law should be its prime consideration. On the same token, in determining the misconduct of the employee, the Industrial Court should not have proceeded as if it is exercising the function of a criminal court.
>
> On the facts and circumstances of this case, and to quote Abdul Hamid Mohamad JCA in *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair* [2002] 3 MLJ 129 'the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in a court of law. The industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decides a case in accordance with equity and good conscience'. The Industrial Court has failed to observe this and on this ground alone, this court is prepared to issue an order of certiorari to quash the said decision. The Industrial Court has erred and misdirected itself on the issue of burden of proof and has committed an error of law.

The learned judge went on to say as follows:

> As to errors of law, it has always been held that an inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely administrative function, has no jurisdiction to commit an error of law. If an inferior tribunal or other public decision taker does make such error, then he exceeds his jurisdiction (see *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 at p 342). The court of appeal in the said case further said that:
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account

A relevant considerations (what may be termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

I am of the view that the Industrial Court has committed an error of law in considering the issue as to the type of thinner that was allegedly taken out by the first respondent. This court B is of the view that it is irrelevant for the purpose of the charge against the first respondent what the thinner was used for, be it for mixing paint or for the purpose of cleaning. The material issue before the Industrial Court should be the taking out of the thinner without authorization and there is clear evidence to that effect as found by the Industrial Court itself when it held at p 2 of the award that, 'it is not in dispute that this taking out of the thinner is without the authorization or prior approval of the relevant officers of the C company.

The learned judge then concluded as follows:

Upon reviewing the manner in which the decision of the Industrial Court was made, I hold that the decision was flawed by the abovementioned reasons and such a decision must not D be allowed to stand. In the circumstances, this application is allowed with costs. I further order that the matter be remitted to the Industrial Court to be dealt with accordingly before a different panel.

[22] At the appeal before us, learned counsel for the appellant submitted that the E learned judge completely overlooked the alternative finding of the Industrial Court that the punishment of dismissal was excessive. He argued that the learned judge has not given any reasons why he found that differentiating the types of thinner was irrelevant and that an error of law was committed given that the specific reason the respondent themselves have given for dismissing the appellant was that he had taken out thinner that can be used for paint mixing. Counsel insisted that it is an important F distinction to make as the thinner for paint mixing was kept in the store whereas the one for cleaning was kept in the Paint Shop section for the workers to use.

[23] The appellant's counsel then submitted that the learned Chairman found that the appellant was not dishonest and hence the learned judge is bound to accept such G finding. He also argued that the learned judge had erred when he held that the Industrial Court erred and misdirected itself on the issue of burden of proof and thereby committed an error of law. Counsel further insisted that the learned judge treated this matter in a manner of an appeal and had misappreciated that the learned Chairman had not committed any error of law in the *Wednesbury* sense.

H

[24] In opposing the appeal, learned counsel for the respondent pointed out that from the evidence and the pleadings, it is not in dispute that the appellant was carrying away with him 1.5 litre of thinner which was the respondent's property in a bottle when he was stopped and questioned by the security guard at the exit point. I He consequentially pointed out that it is a rule within the respondent and an implied term in the contract of service that workers shall not take away the respondent's property and with regard to this the appellant had admitted in his evidence in court that he did not ask for permission to take away the thinner. With regards to the dismissal of the appellant, he submitted there was no evidence of any mala fide or ulterior motive.

[25] The respondent's counsel consequently argued the Industrial Court should not have proceeded as if it is exercising the function of a criminal court and that the standard of proof applicable is the civil standard, i.e., proof on a balance of probabilities and not that of beyond a reasonable doubt. In relation to this he referred to *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor* [2002] 3 MLJ 129.

[26] We are of the view that the learned judge adopted the correct approach when he said that what matters is not type of thinner that was taken out, but the taking out of 1.5 litre of thinner without authorization. It is not disputed that the thinner was taken out without authorization. We are also of the view that the learned judge was right when he found that the Industrial Court had committed an error in law in finding that the thinner that was taken by the appellant was not the thinner that was used for the mixing of paint and that it was 'unwanted thinner'. The evidence clearly showed that the thinner used for mixing paint in the store was the same thinner that was given upon request for cleaning the spray gun and the worker's hands. In relation to this, we noticed that the learned Chairman had also taken into account an irrelevant consideration in arriving at the decision that she made, namely, that the respondent only suffered a loss which is minimal as it involved only 1.5 litre of thinner. We are of the view that the value of the thinner which was taken out of the factory by the appellant is immaterial. What is material is that the thinner was the respondent's property and the appellant was not authorized to take it out of the respondent's premises.

[27] On the whole, the learned judge applied the true principal in making the decision that he did, namely, that in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law. In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*, which was referred to by the learned judge, this court held that an inferior tribunal or other decision making authority, whether exercising a quasi-judicial function or purely administrative function, has no jurisdiction to commit an error of law and that if an inferior tribunal or other public decision maker does make such an error, then it exceeds its jurisdiction.

[28] In *Menara Pan Global Sdn Bhd v Arokianathan Sivapiragasam* [2006] MLJU 131 this court has reiterated the principle that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal and that the High Court will not interfere with finding of facts by the Industrial Court unless the same completely unsupported by evidence. In the instant appeal, we find that the finding of facts made by the learned Chairman cannot be supported. Further, she had introduced technicalities of the court of law to the Industrial Court instead of going into the substantial merits of the case. We would agree with the views of the learned judge that in determining the misconduct of the appellant, the Industrial Court proceeded as if it was exercising the function of a criminal court. As such, we cannot see how it can be contended by the appellant that the High Court had acted as a court of

appeal under the circumstances of the instant appeal. From our reading of the learned judge's grounds of decision, we are satisfied that he appreciated that judicial review is not an appeal from the decision but a review of the manner in which the decision is made.

[29] Incidentally, a question which was posed by us at the hearing of this appeal was in relation to the consequential order made by the learned judge, namely, that the matter be remitted to the Industrial Court 'to be dealt with accordingly before another panel'. It was noted that no such relief was specifically prayed for by the respondent in its application. In relation to this, both parties volunteered to forward written submissions on this issue and thus we adjourned our decision to a date to be fixed.

[30] With regards to this poser and after perusing the written submission forwarded, we came to the view that the learned judge was perfectly correct in ordering that the matter be remitted for readjudication before another Chairman of the Industrial Court. Learned counsel for the respondent argued that having quashed the award, there is nothing more left to be done by the Industrial Court. We do not agree. On this issue, O 53 r 2(3) of the Rules of the High Court 1980 read as follows

> Upon the hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

[31] Thus, the High Court pursuant to the above order may make any order upon hearing an application for judicial review and it shall not be confined to the relief claimed. The learned judge has deemed it appropriate to remit the matter for readjudication. We find nothing wrong with that decision. It was clearly within his powers and we find that he had exercised that discretion judiciously under the circumstances of this instant appeal. The learned Chairman has committed an error of law through no fault of the appellant and thus it would be in the interest of justice that the matter be readjudicated on the substantial merits of the case. An order for readjudication of the matter would fall within the contemplation of O 53 r 2(3). The learned judge has exercised his discretion and we see no reason to disturb it. A similar poser was raised in *Malayawata Steel Bhd v Mohd Yusof bin Abu Bakar & Anor* [1994] 2 MLJ 167. This was how Vincent Ng J dealt with the issue; he said (at p 178):

> Now, the resultant question that this court is faced with, in a situation where the inferior tribunal had failed to consider certain matters which it ought to have considered, is whether the High Court has the power, upon the issuing of an order of certiorari to quash the decision, to also consequentially make an order or direction remitting the matter for a rehearing (as in this case) on the substantial merits of the case. Defective decisions are often quashed by certiorari without any consequential order of mandamus presumably upon the assumption that if its decision is annulled, the deciding authority will recognise that it must begin again. See *Cik Aniza Yaacob & Ors v Mostek Malaysia Sdn Bhd & Ors* [1988] 1 MLJ 451.
>
> In a case where a certiorari order is issued basically on the ground that the inferior tribunal had failed to consider certain matters which it ought to have considered then the cardinal

question to be posed is would the tribunal have come to a different decision if it had considered those matters. If one can say with utmost certainty that it would have given a different decision then the matter would have ended with just the order of certiorari. But in the interest of justice if there is a probability, however marginal it may be, that the tribunal could, even after considering the matters it had earlier omitted to consider, come to the same or similar decision, then the matter ought to be remitted to the tribunal with an order or direction in the nature of a mandamus to compel the tribunal to consider the matter or matters it ought to have considered that is as in our current case the substantial merits of the case. Unfortunately, we do not have any Malaysian decision where this additional power of the High Court has been explored or explained.

[32] We would align ourselves with the views of Vincent Ng J discussed above.

[33] Under the circumstances in this instant appeal, an error of law was clearly disclosed and hence the learned judge was correct in allowing the respondent's application for certiorari.

[34] This is certainly a fit and proper case for certiorari to be issued and we hereby dismiss the appeal with costs. All orders made by the learned judge are hereby affirmed. This matter is hereby remitted to the Industrial Court for readjudication and conclusion according to law before another Chairman. We would also order that the deposit be remitted to the respondent towards the account of taxed costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee